

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On October 1, 2018 appellant, then a 33-year-old physician assistant, filed a notice of recurrence (Form CA-2a) alleging a recurrence of disability and the need for medical treatment commencing September 25, 2018, due to an accepted March 19, 2018 employment injury.³ She reported that she experienced multiple triggers in the workplace relating to her sexual assault that caused her to experience increased panic attacks, situational anxiety, and post-traumatic stress disorder (PTSD) flashbacks.

In a letter dated January 31, 2019, OWCP advised appellant that, based on the description of the circumstances that prompted her to file her Form CA-2a and the evidence of record, she was actually claiming a new occupational disease attributed to new employment factors over the course of more than one work shift and not a recurrence of her previous injury. It converted her claim into a new occupational disease claim using her Form CA-2a, assigned OWCP File No. xxxxxx590.

In a subsequent development letter dated February 5, 2019, OWCP advised appellant of the deficiencies of her occupational disease claim. It informed her of the type of evidence needed to establish her claim and provided questionnaire for her completion. In a separate development letter of even date, OWCP requested that the employing establishment provide comments from a knowledgeable supervisor regarding the accuracy of appellant's allegations. It afforded both parties 30 days to respond.

Appellant submitted a September 26, 2018 text conversation between herself and her supervisor, J.G., wherein she informed him that she had not slept well the night before due to nightmares. Just before she was scheduled to arrive at work, she informed him that she had a panic attack and that she experienced an event at the end of her workday previously that triggered her.

In a February 13, 2019 medical note, Dr. Donald Shoenthal, Board-certified in family medicine, advised that appellant needed to be excused from work for at least another two weeks until she was reevaluated again on February 27, 2019. In a subsequent February 27, 2019 medical note, he advised that she would need to remain off work as she continued eye movement desensitization and reprocessing (EMDR) therapy.

In a medical report of even date, Dr. Shoenthal noted that appellant presented for follow up and indicated that she was still experiencing difficulty with insomnia related to the March 19,

³ Under OWCP File No. xxxxxx464, appellant filed a traumatic injury claim (Form CA-1), alleging that, on March 19, 2018, she was sexually assaulted while in the performance of duty. She stopped work on April 19, 2018. On June 20, 2018 OWCP accepted appellant's claim for other specified anxiety disorders, panic disorder (episodic paroxysmal anxiety) without agoraphobia, and insomnia, unspecified. Appellant returned to work on September 19, 2018, but stopped work again on September 25, 2018.

2018 employment incident. He diagnosed depression/anxiety, PTSD and situational anxiety. Dr. Shoenthal documented that appellant experienced multiple stressors from work and her home life.

In a February 28, 2019 response to OWCP's development questionnaire, appellant detailed her return to work beginning September 19, 2018. She related that she experienced a panic attack that morning when she met with J.G. because it was her first time returning to work following the assault and she did not know who assaulted her. The following day appellant reported that she experienced anxiety as she began to see patients while alone in a room with them. She alleged that she was also told by her supervisor that she would need to return to the 11th floor where the assault took place. Appellant asserted that this caused her a great deal of anxiety as she felt pressured when her supervisor informed her she would have to "go up there eventually." She believed the man who assaulted her could still be up there and she did not want to be caught on the 11th floor alone again. Appellant alleged that M.W., her coworker, agreed to go to the 11th floor with her and upon looking through her belongings, she was triggered again when she found the ear buds she was wearing on the day of the assault. She concluded that she was unable to function for the rest of the workday.

Appellant further related that she was informed that on March 21, 2018 the cameras on the 11th floor were not working during the time of the sexual assault. She broke down, believing that she would never be able to identify the person who assaulted her. Appellant also described the September 25, 2018 incident where a male employee who she did not know sought to give her a volunteer shirt placed his arm around her and asked her what size shirt she was. She immediately left the room, grabbed her purse and had not returned to work since, explaining that she had a panic attack and that her PTSD was taking over. Appellant concluded that she had such strong reactions because she was in the environment where her assault took place without knowing who assaulted her. She reacted to every man as if he was a suspect and that she was unsafe.

Appellant continued by explaining that she filed her recurrence claim for this period because she related her inability to work to the March 19, 2018 assault. Her therapist explained that the employment incidents she described when she returned to work re-traumatized her and caused her to develop a new diagnosis of PTSD. Appellant further detailed the development of her related symptoms since she returned to work on September 19, 2018 as well as her medical treatment for her conditions.

In a March 1, 2019 statement, J.S., appellant's coworker, recounted that on the day she returned to work she informed her of the reason she had been absent from work. Appellant informed her that the police were unable to identify her attacker because the cameras were not functioning at the time of the assault. J.S. observed that she appeared withdrawn and afterwards left the conversation feeling scared for the safety of the women in the work area. Appellant later spoke with her after her supervisor requested that she return to the 11th floor. She cried and informed J.S. that she did not feel she was able to return at that time. She recommended that appellant inform her supervisor that she was not ready to return to the 11th floor.

In a March 5, 2019 medical report, appellant informed Dr. Shoenthal that she felt her symptoms had improved with EMDR trauma therapy and treating with a mental health therapist.

He diagnosed depression/anxiety, PTSD and insomnia and advised that she continue her EMDR therapy sessions.

In a letter of even date, Dr. Shoenthal reviewed the history of appellant's treatment in relation to the March 19, 2018 employment incident. He noted that she was placed on medical leave and received treatment for her diagnoses of PTSD, situational anxiety, insomnia and depression. Upon her return to work, Dr. Shoenthal recounted the events from September 19 to 25, 2018, specifically noting that appellant was asked to return to the floor in which the sexual assault took place and that she was approached by a male employee who placed his hand on her shoulder and asked her for her shirt size. He explained that because of the employment events appellant was placed back into crisis therapy and had been receiving private psychological counseling therapy. Dr. Shoenthal concluded by finding that appellant was unable to return to work due to the exacerbation of her conditions.

In a March 13, 2019 medical note, Dr. Shoenthal advised that appellant needed to be excused from work for the period February 26 to March 18, 2019. He advised that she could return to work on March 18, 2019 with the condition that she be cleared to work at a different location.

By decision dated March 29, 2019, OWCP denied appellant's occupational disease claim, finding that the evidence of record was insufficient to establish the medical component of fact of injury. It explained that she did not submit any medical evidence containing a medical diagnosis in connection with the employment incidents described. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On April 15, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on July 8, 2019.

Appellant submitted psychiatric evaluations dated from April 23 to July 16, 2019 in which Dr. Kimberly Clinebell, a Board-certified psychiatrist, observed that appellant had completed EMDR therapy and returned to work at a different location after the March 19, 2018 employment incident. She noted prior diagnoses of depression, anxiety and PTSD and associated symptoms. On evaluation Dr. Clinebell diagnosed PTSD, major depressive disorder, generalized anxiety disorder and panic disorder without agoraphobia. She prescribed medication and advised that appellant continue her therapy sessions with Emily Heyl, a licensed professional clinical counselor.

By decision dated April 13, 2019, the hearing representative affirmed the March 29, 2019 decision as modified, finding that although OWCP failed to include new compensable employment factors in its initial denial decision, appellant still had not submitted evidence from an appropriate specialist providing a diagnosis linked to the accepted factors of employment.⁴

On April 22, 2020 appellant, through counsel, requested reconsideration of the April 13, 2019 hearing decision. Attached was a November 6, 2018 initial evaluation in which Dr. Francine

⁴ The hearing representative also noted that, insofar as the claim related to appellant's earlier claimed injury, it should be administratively combined with OWCP File No. xxxxxx464. OWCP subsequently administratively combined OWCP File Nos. xxxxxx464 and xxxxxx590 with the latter serving as the master file.

Fettman, a Board-certified psychologist, evaluated appellant's symptoms of trauma after her March 2018 sexual assault. She reviewed the history of the employment incident, appellant's subsequent symptoms and her history of medical treatment. Dr. Fettman diagnosed PTSD and opined that it was clear that she demonstrated symptoms of PTSD resulting from the assault she experienced at work. She suggested different therapies for appellant to undergo, including EMDR therapy. Counsel also attached several therapy progress notes dated from November 6, 2018 to January 2, 2019.

By decision dated July 20, 2020, OWCP denied appellant's reconsideration request pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.⁵

To require OWCP to reopen a case for merit review, pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁶

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.⁷ If it chooses to grant reconsideration, it reopens and reviews the case on its merits.⁸ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁹

⁵ 5 U.S.C. § 8128(a); *see L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *D.L.*, Docket No. 09-1549 (issued February 23, 2010); *W.C.*, 59 ECAB 372 (2008).

⁶ 20 C.F.R. § 10.606(b)(3); *see L.D., id.*; *see also L.G.*, Docket No. 09-1517 (issued March 3, 2010); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

⁷ *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of the merit decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (September 2020). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

⁸ *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

⁹ *Id.* at § 10.608(b); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

ANALYSIS

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

On reconsideration appellant submitted a November 6, 2018 report, wherein Dr. Fettman diagnosed PTSD and opined that it was clear that she demonstrated symptoms of PTSD resulting from the assault she experienced at work. As this report addresses the underlying issue of whether a medical condition had been diagnosed in connection with the accepted employment factor(s), the report constitutes relevant and pertinent new evidence that was not previously considered. Therefore, the Board finds that the submission of this evidence requires reopening of appellant's claim for merit review pursuant to the third requirement of 20 C.F.R. § 10.606(b)(3).¹⁰

Consequently, the Board will set aside OWCP's July 20, 2020 decision and remand the case for an appropriate merit decision on appellant's claim.¹¹

CONCLUSION

The Board finds that OWCP improperly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹⁰ 20 C.F.R. § 10.606(b)(3); *see also J.T.*, Docket No. 20-1301 (issued July 28, 2021); *M.J.*, Docket No. 20-1067 (issued December 23, 2020).

¹¹ *F.K.*, Docket No. 21-0998 (issued December 29, 2021).

ORDER

IT IS HEREBY ORDERED THAT the July 20, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 6, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board